The setting of fines: efficiency and due process

Heinemann, Andreas

The Setting of Fines – Efficiency and Due Process

ANDREAS HEINEMANN*

Contents Pages

* PROF. DR. ANDREAS HEINEMANN, Professor of Commercial, Economic and European Law at the University of Zurich.

I. Introduction

Since 1962, European competition law contains a rule according to which firms can be fined up to ten percent of last year's worldwide turnover in case of violations of the European competition rules.[1] This rule has been taken over into Regulation 1/2003.[2] In the past years, fines imposed by the European Commission and by some national competition authorities in the EU Member States have increased considerably.[3] This development has caused growing criticism as to the compatibility of cartel fines with the rule of law, legal certainty and fundamental rights. Regulation 1/2003 contains a clear statement on this question. According to recital 37, ‹This Regulation respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union.›[4] It has to be analyzed if this optimistic self-assessment holds true.

The situation is similar in Switzerland. Cartel fines in the international sense (i.e. direct sanctions for the violation of substantive competition law as opposed to fines imposed for disobedience with authority decisions) have been introduced by the reform of 2003 (in force since 2004, end of the transitional period in 2005). According to Sec. 49a (1) Cartel Act, fines for certain unlawful agreements and for the abuse of a dominant position may go up to 10 percent of the turnover in Switzerland in the previous three years.[5] The first application of direct sanctions was an essential facilities case at Zurich Airport concerning parking services. The amount of the fine imposed in September 2006 was 101,000 CHF.[6] The second case was the mobile phone case concerning termination prices for calls going into the mobile network of the incumbent. Swisscom was fined 333 millions CHF in February 2007.[7] Therefore, we may say: The development from modest sums to considerable amounts, which took decades in the EC/EU, took five months in Switzerland. It is not surprising that this development has provoked sharp criticism.

1 Art. 15 (2) Regulation 17/1962.

2 Art. 23 (2) Regulation 1/2003.

3 See RIZVI, Entfesselte Bussenpraxis im Wettbewerbsrecht? – «Quis custodiet ipsos custodes?», AJP/PJA 2010, 452. But see WILS, The Increased Level of EU Antitrust Fines, Judicial Review and the ECHR, 33 World Competition 5, 10–12 (2010) who analyzes the fining practice against the backdrop of inflation and proportionality to the size of the infringement.

4 Recital 37 continues: «Accordingly, this Regulation should be interpreted and applied with respect to those rights and principles.»

5 This is less than the European rule if the company generates more than two-thirds of its revenue abroad, but it is more if it does not.

6 COMPETITION COMMISSION, 18.9.2006 – *Flughafen Zürich AG (Valet Parking)*, RPW 2006, 625.

7 COMPETITION COMMISSION, 5.2.2007 – *Terminierungspreise im Mobilfunk*, RPW 2007, 241. The fine was annulled by the Federal Administrative Court, 24.2.2010 – *Swisscom*, Recht und Politik des Wettbewerbs (RPW) 2010/2, 242.

The topic of fines has numerous ramifications.[8] The following remarks will focus on the function of fines, on the institutional question of the competent body, on the question of full judicial review of administrative decisions and on legal certainty.

II. Functions of Fines

Whereas fines have pivotal significance in competition law, European legislation is rather reserved as to their exact functions. The recitals of Regulation 1/2003 devote more space to the question to what extent members of an association may be held responsible for fines imposed on that association (recital 30[9]) than to the goals of fines themselves. The legal text merely contains the statement that compliance with the European competition rules ‹should be enforceable by means of fines› (recital 29), but does not indicate why fines are needed in this context. The Guidelines on the method of setting fines[10] are more explicit in this respect. According to the Guidelines, the Commission not only has the task to investigate single cases, but also to develop a general policy in order ‹to steer the conduct of undertakings›.[11] The Commission underlines the importance of specific and general deterrence.[12]

As regards private enforcement, the recent discussion on the strengthening of damages actions in Europe[13] equally concerned the functions of the different enforcement mechanisms. There is a preference in Europe for a clear separation of functions between public and private enforcement. Whereas public enforcement aims at punishment/repression and prevention, private enforcement strives for compensation.[14] It is true that in the common law countries, i.e. Ireland and the UK, punitive damages are available. But they do not play an important part.

8 See for example BREITENMOSER, Focus: Court Appeals in Competition Law, in BAUDENBACHER (ed.), Current Developments in European and International Competition Law, ICF 2008 (2009) 381 et seq.; SEITZ, Prävention – Sanktion – Grundrechtsschutz, Verhinderung von Verletzungen wettbewerbsrechtlicher Normen im Unternehmen, in WOLF/MONA/HÜRZELER (eds.), Prävention im Recht (2008) 311 et seq.; SPITZ, Ausgewählte Problemstellungen im Verfahren und bei der praktischen Anwendung des revidierten Kartellgesetzes, sic! 2004, 553 et seq.

9 See Art. 23 (4) Regulation 1/2003.

10 EUROPEAN COMMISSION, Guidelines on the method of setting fines imposed pursuant to Article 23 (2)(a) of Regulation No 1/2003, OJ C 210/2 of 1.9.2006.

11 Guidelines (n. 248 above) no 4.

12 *Ibid.*

13 Cf. HEINEMANN, Private Enforcement in Europe, in ZÄCH/HEINEMANN/KELLERHALS (eds.), The Development of Competition Law – Global Perspectives (2010) 300 – 318.

14 SEITZ (n. 246 above) 320 et seq.; THEURER, Geldbußen im EU-Wettbewerbsrecht (2009) 61 et seq.; WILS, The Relationship between Public Antitrust Enforcement and Private Actions for Damages, 32 World Competition 3, 12 (2009).

There have been proposals to provide for double damages in private enforcement of EU competition law (thus introducing deterrence into private law following the US example),[15] but these proposals have not been successful.

Therefore, the roles are clearly distributed: In the first place, private law should enable victims to get compensated whereas public enforcement should provide deterrence. This starting point – the distinction between the compensatory goal of private enforcement and the preventive goal of public enforcement – is blurred by two phenomena: On the one hand, modern developments in the theory of private law plead for enriching private law by preventive goals.[16] On the other hand, public enforcement in many legal orders is given the task of skimming off the economic benefit obtained by the competition law violation, to a greater or lesser extent. In Switzerland, for example, the profit achieved by the unlawful behaviour has to be taken into account when determining the amount of the sanction, Art. 49a (1) 4 of the Swiss Cartel Act.[17] In Germany, the benefit stemming from the unlawful act may be skimmed off, but does not have to, see § 81 (5) of the German Cartel Act.[18] Under

15 EUROPEAN COMMISSION, Green Paper on Damages Actions for Breach of the EC Antitrust Rules, 19 December 2005, COM(2005) 672 final, Option 16; MONOPOLKOMMISSION (Germany), Das allgemeine Wettbewerbsrecht in der 7. GWB-Novelle, Sondergutachten (2004) at no. 75 et seq., 126, 131 (www.monopolkommission.de/sg_41/text_s41.pdf, all websites quoted in this article accessed 12 August 2010). In the White Paper (White Paper on Damages Actions for Breach of the EC Antitrust Rules, 2 April 2008, COM(2008) 165 final), the European Commission has abandoned the proposal to introduce double damages.

16 There are tendencies to integrate a prevention function into tort law. For Switzerland see REY, Ausservertragliches Haftpflichtrecht (3rd ed., 2003) no. 12–17; for Germany see WAGNER, Prävention und Verhaltenssteuerung durch Privatrecht – Anmassung oder legitime Aufgabe?, AcP 206 (2006) 352, especially 451 et seq.

17 This rule is repeated in Art. 2 (1) Ordinance on Sanctions imposed for Unlawful Restraints of Competition (Cartel Act Sanctions Ordinance, CASO) of 12 March 2004, SR 251. According to Art. 5 (1) lit. b CASO, a profit that is particularly high by objective standards is listed as an example for aggravating circumstances. For the practice of the Competition Commission see TAGMANN/ZIRLICK, in AMSTUTZ/REINERT (eds), Kartellgesetz – Basler Kommentar (2010) Art. 49a no. 71.

18 The legal situation in Germany is complicated: The fine may be calculated in order to skim off the economic benefit of anticompetitive behaviour, § 81 (5) of the German Cartel Act. Moreover, according to the general rules of criminal law or the law against administrative offences («Ordnungswidrigkeiten») respectively, economic benefits derived from an offence may be skimmed off by an order of forfeiture («Verfall»). If neither is the case, and if the benefit has not been passed over to the victims as damages either, the competition authority may in a separate procedure order the skimming off of benefits, § 34 of the German Cartel Act. If it does not do so, certain associations may – under more restrictive conditions – require the offender to surrender the economic benefit to the federal budget, § 34a of the German Cartel Act.

former German law, fines could go up to three times the additional proceeds obtained as a result of the violation.[19]

Thus, a link is established between the unlawful profits of offenders and the calculation of fines. An argument in favour of such a link is the Law & Economics of fines with its focus on optimal deterrence according to which the minimal amount of a fine should be fixed at the level of the cartel rent divided by the probability of detection.[20] However, on the one hand, this approach creates considerable problems of proof: It has turned out to be difficult to determine cartel rents even if cartel authorities are allowed to estimate them.[21] On the other hand, the coexistence of public and private enforcement is neglected. In theory, victims should be compensated entirely so that cartel rents are skimmed off via private claims. The fine should come on top and guarantee deterrence.[22] Even if private enforcement is not yet sufficiently developed in Europe, this shows that profits stemming from anti-competitive behaviour are not a good basis for determining fines.[23]

19 § 81 (2) of the German Cartel Act 1999, as in force until the 7th Cartel Reform of 2005.

20 See THEURER (n. 252 above) 283 et seq.; WILS, Optimal Antitrust Fines: Theory and Practice, 29 World Competition 183, 190 et seq. (2006). FORRESTER (n. 266 below, 5) points to the fact that such a calculation makes only sense for a company's management, but that cartels are usually practiced by individuals without the knowledge of senior management.

21 See for example the German BUNDESGERICHTSHOF, 19.6.2007 – *Wholesale paper markets*, KRB 12/07 regarding the rule of former German law which linked the fine to the cartel rent (see n. 257 above): The method of the lower instance for calculating cartel rents by relying on the lower prices of cartel participants occasionally undercutting the fixed minimum price was not accepted. The court recommended in the first place the concept of comparable markets, and secondarily the cost plus approach.

22 For an opposing view see SCHWARZE/BECHTOLD/BOSCH, Deficiencies in European Community Competition Law – Critical analysis of the current practice and proposals for change (2008, available at http://ec.europa.eu/competition/consultations/2008_regulation_1_2003/gleiss_lutz_en.pdf) 47, who see the principal task of fines in skimming off gains: «It might be reasonable to add a certain amount as a sanction for the infringement, but the fine should be based principally on the gains of the infringer from the infringement.»

23 It has to be added that the different functions of public and private enforcement do not exclude that quick and «voluntary» compensation of victims is taken into account as mitigating circumstances, see THEURER (n. 252 above) 251–252. The question may be asked if compensation should not be a precondition for profiting from leniency programs. US law answers this question in the affirmative, see US DEPARTMENT OF JUSTICE, Corporate Leniency Policy, 1993 (www.usdoj.gov/atr/public/guidelines/0091.htm), A5 and B6: «Where possible, the corporation makes restitution to injured parties.»

Moreover, the legitimacy of fines is under-minded when they are based on the cartel rent which increasingly will be skimmed-off by private litigation. Another argument may be based on anticompetitive behaviour which eventually is not advantageous for the infringer: The fact that he did not reap any benefits from his behaviour, does not mean that the violation must not be sanctioned or has to be reduced.[24]

Therefore, it is preferable that fines are not necessarily linked to cartel rents. This is for example the case in the European Union. According to Art. 23 (3) Regulation 1/2003, ‹in fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement.› In its fining guidelines, the Commission refers to the value of the sales of goods or services to which the infringement relates and the number of years (plus an amount irrespective of the duration of the infringement). As the Commission says in its fining guidelines, the reference to the relevant turnover serves as a proxy for the economic importance of the infringement.[25] A reference to cartel rents is made only in a cautious way.[26] Swiss law, which at present obliges the Competition Commission to take into account presumed profits for the determination of fines (at least ‹appropriately›),[27] should be adapted correspondingly.

24 Cf. GENERAL COURT, 29.11.2005, T-64/02 – *Heubach* [2005] ECR II-5137, no 184–187.

25 Guidelines (n. 248 above), no 6. The Commission adds: «Reference to these factors provides a good indication of the order of magnitude of the fine and should not be regarded as the basis for an automatic and arithmetical calculation method.» The turnover criterion is criticized by BRETTEL/THOMAS, Unternehmensbussgeld, Bestimmtheitsgrundsatz und Schuldprinzip im novellierten deutschen Kartellrecht, ZWeR 2009, 25 (47–48).

26 See Guidelines (n. 248 above), no 31: «The Commission will also take into account the need to increase the fine in order to exceed the amount of gains improperly made as a result of the infringement where it is possible to estimate that amount.» Since the 7th Cartel Reform of 2005, German law is comparable (see n. 256 above). The fine may be used to skim off benefits of anti-competitive behaviour, but cartel authorities are not restricted to this goal. Fines may as well serve the exclusive goal of repression. See the Draft proposal of the German Federal Government (Gesetzentwurf der Bundesregierung, Bundestags-Drucksacke 15/3640), p. 67: «Im neuen Recht kann die Geldbuße demnach auch als reine Ahndungsmaßnahme festgesetzt werden.»

27 See n. 255 above.

III. The Competent Body: Administrative Authorities or Courts?

A. Starting Point

Much criticism has been expressed against competition law systems which – like the EU and Switzerland – entrust administrative authorities with the enforcement of competition law even if these authorities act under the control of the judiciary.[28] According to the critics, an administrative authority is not allowed to have at the same time the power to investigate, to accuse and to decide, if the level of fines exceeds a certain limit.[29] Already in first instance, firms should benefit from an impartial tribunal.

As regards the EU, there is an additional reproach: The European Commission in its entirety is competent for taking decisions in competition matters, but only one member of the 27 persons college – the Commissioner responsible for Competition Policy – has followed the case more closely.[30] But even the Competition Commissioner does not attend the (optional) oral hearing.[31] The hearing officers, according to the critics, are not as independent as they should be as they act

28 See e.g. FORRESTER, Due Process in EC competition cases: a distinguished institution with flawed procedures, 34 European Law Review 817 (2009); HOFSTETTER, EU Cartel Fining Laws and Policies in Urgent Need of Reform, GCP: The Antitrust Chronicle, November 2009 (2); MONTAG, The Case for a Radical Reform of the Infringement Procedure under Regulation 17, 8 ECLR 428 (1996); SCHWARZE/BECHTOLD/BOSCH (n. 260 above); SLATER/THOMAS/WAELBROECK, Competition law proceedings before the European Commission and the right to a fair trial: no need for reform?, GCLC Working Paper 04/08. For opposing views see CASTILLO DE LA TORRE, Evidence, Proof and Judicial Review in Cartel Cases, 32 World Competition 505 (2009); WILS (n. 241 above).

29 Often the situation in the US is referred to where the Antitrust Division of the US Department of Justice has to prosecute a case before the courts. For the situation of the US Federal Trade Commission and a comparison with the European enforcement mechanism see VANDENBORRE/PERISTERAKIS, Best Practices for the Conduct of Antitrust Procedures: Further Thoughts, The CPI Antitrust Journal, April 2010 (1), 1 et seq.

30 SCHWARZE/BECHTOLD/BOSCH (n. 260 above) 54; VESTERDORF, Due Process Before the Commission of the European Union?, The CPI Antitrust Journal, April 2010 (1), 4. See the criticism of FORRESTER (n. 266 above) 4, 8: «It is unimaginable that a new Member State would be allowed to adopt a competition law regime under which the Prime Minister and cabinet of the country decided on guilt, innocence and penalty in a competition matter.»

31 See VANDENBORRE/PERISTERAKIS (n. 267 above) 7.

under the control of the Commission.[32] Generally, according to the critics, the internal checks and balances of the European Commission (peer review, consultation with the legal service and other services of the Commission, input by the Advisory Committee composed of representatives of the Member States' competition authorities, view of the other Commissioners etc.) do not guarantee a sufficient impartiality compatible with Art. 41 of the Charter of Fundamental Rights of the European Union.[33] The Best Practices on the Conduct of Proceedings recently published by the European Commission for public consultation[34] contain a description of the status quo but do not address the fundamental problem concerning the role of the Commission as an investigator, prosecutor and adjudicative authority in one single body.

B. Access to Courts

As regards the institutional setting, there are similarities between the EU and Switzerland. In Switzerland, as in the EU, an administrative authority is in charge to apply competition law and to impose fines. Recently, in the *Swisscom*

32 VESTERDORF (n. 268 above), at p. 5 footnote 10, suggests that the Hearing Officer be appointed by and belong to the cabinet of the President of the Commission. FORRESTER (see n. 266 above, 13–15) proposes to remove the decision-shaping function from the case team and attribute it to the hearing officer or a hearing tribunal which would submit its conclusions to the Commission. The Commission would not have the right to modify the draft decision but could only adopt it or reject it.

33 Art. 41 (1) of the Charter reads: «Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union.» See the critical remarks by GLADER, Best Practices in Article 101 and 102 Proceedings: Some Suggestions for Improved Transparency, The CPI Antitrust Journal, April 2010 (1) 4 et seq., and VESTERDORF (n. 268 above, 3) who points to the danger of a «tunnel vision» of the officials implied. See in this context the distinction between confirmation bias, hindsight bias and the desire to show a high level of enforcement activity by WILS, The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function, 27 World Competition 202, 214 et seq. (2004).

34 EUROPEAN COMMISSION – DG COMPETITION, Best Practices on the conduct of proceedings concerning Articles 101 and 102 TFEU, 6 January 2010. Two other documents were published simultaneously: EUROPEAN COMMISSION – DG COMPETITION, Best Practices for the Submission of Economic Evidence and Data Collection in Cases Concerning the Application of Articles 101 and 102 TFEU and in Merger Cases, 6 January 2010; EUROPEAN COMMISSION – THE HEARING OFFICE, Hearing Officers – Guidance on Procedures of the Hearing Officers in Proceedings Relating to Articles 101 and 102 TFEU (ex-articles 81 and 82 EC), 6 January 2010. The three documents and the reactions of interested parties are published at http://ec.europa.eu/competition/consultations/2010_best_practices/index.html.

case, the Swiss Federal Administrative Court had to assess the conformity of the institutional structure with Art. 6 of the European Convention on Human Rights (ECHR). It held that the fines present a criminal character so that the aforementioned article applies.[35] Leaving the question open if the Swiss Competition Commission is a tribunal in the sense of Art. 6 (1) ECHR,[36] the Court refers to established case law according to which it is sufficient – for the sake of flexibility and efficiency and under certain conditions – that a tribunal can be invoked at a later stage, provided that the tribunal has full jurisdiction regarding facts and law. The Court intensively discusses the question which these conditions are. According to a wide-spread interpretation of the ECtHR's case law, this exception only applies to criminal charges which have a disciplinary nature or are of minor importance.[37] According to this position, the high fines imposed for competition law violations in recent years cannot be qualified as of minor importance. The Swiss Federal Administrative Court does not share this view and takes a stand against a narrow interpretation of the ECtHR's case law (for example *Öztürk*[38] and *Bendenoun*[39]) by referring to the *Mamidakis* case.[40] The Court comes to the conclusion that the administrative enforcement system in Switzerland is compatible with Art. 6 ECHR.[41]

35 The leading case concerning the existence of a «criminal» offence in the sense of Art. 6 ECHR is European Court on Human Rights (ECtHR), case no. 5100/71 et al. of 8 June 1976 – *Engel and others v. The Netherlands*. According to this judgment, three criteria (the so-called «Engel criteria») have to be referred to. First, it has to be taken into consideration how national law qualifies the offence. The second criterion is the nature of the offence, the third one concerns the nature and the severity of the penalty.

36 Federal Administrative Court – *Swisscom* (n. 245 above) no. 5.4.

37 See SLATER/THOMAS/WAELBROECK, Competition law proceedings before the European Commission and the right to a fair trial: no need for reform?, GCLC Working Paper 04/08 (www.coleurope.eu/content/gclc/documents/GCLC%20WP%2004-08.pdf) 30 et seq. with further references.

38 ECtHR, case no. 8544/79 of 21 February 1984 – *Öztürk*: Minor offences, notably in the sphere of road traffic, may be prosecuted and punished by administrative authorities if the person concerned can bring the case to a tribunal.

39 ECtHR, case no. 12547/86 of 24 February 1994 – *Bendenoun*: An administrative authority may prosecute and punish tax offences even if the surcharges imposed as a penalty are large ones if the case may be brought to court afterwards.

40 ECtHR, case no. 35533/04 of 11 January 2007 – *Mamidakis c. Grèce*.

41 Federal Administrative Court– *Swisscom* (n. 245 above). Confirmed by the same court in the judgment of 27.4.2010 – *Publigroupe*, RPW 2010/2, 329. For reviews of the Swisscom judgment see HEINEMANN, Direkte Sanktionen im Kartellrecht – Das Swisscom-Urteil des Bundesverwaltungsgerichts, Jusletter 21 June 2010; SEITZ, Grundrechtsgewährleistungen in Kartellsanktionsverfahren, EuZW 2010, 292.

Indeed, in the *Mamidakis* case, with respect to a 3 million Euro fine[42] imposed by an administrative tax authority, the ECtHR could not find a violation of Art. 6 ECHR.[43] An amount of this order cannot be qualified as of minor importance. On the other hand, the case primarily dealt with the aspect of due process (especially the absence of arbitrariness) and the presumption of innocence and not explicitly with the right to an independent and impartial tribunal. Therefore, the *Mamidakis* case can certainly be used as an argument in favour of a larger interpretation of the *Öztürk-Bendenoun*-exception, but it does not give us absolute certainty as regards the application of this case law to competition law sanctions.

In our view, Art. 6 ECHR should not be interpreted as an obstacle to a more administrative approach to competition law fines. Criminal law exists on different levels of gravity. The ECtHR has made clear that the fundamental rights to justice do not apply to these different forms of criminal offences with the same intensity. Outside the hard core of criminal law, ‹the criminal-head guarantees will not necessarily apply with their full stringency›.[44] The cases *Bendenoun*[45] and – more clearly – *Mamidakis*[46] show that the large amount of a penalty does not exclude the application of this principle.[47] There is no reason to restrict this rationale to tax surcharges. In the *Jussila* judgment, the ECtHR has explicitly mentioned competition law as an example for ‹cases not strictly belonging to the traditional categories of the criminal law›.[48] Hence, competition fines stay outside the hard core of criminal law. Competition violations constitute criminal offences in the sense of Art. 6 ECHR, but for the imposition of fines it is sufficient that a competition authority acts subject to full court control.

Things would of course be different if core criminal sanctions were introduced, e.g. imprisonment. Here, the decision of an independent court would be indispensable from the very beginning.[49] Outside this field, it is up to the legislature to design the enforcement system. A system based on strong administrative authorities is consistent with the European tradition. It is certainly possible to improve the enforcement mechanism. However, for our context it is relevant that Art. 6 ECHR does not oblige the Member States of the Council of Europe to transfer decisional competences from administrative authorities to courts.

---

42 Including joint and several liability for fines imposed on other participants, the total sum approximated 5 million Euro.

43 See n. 278 above.

44 ECtHR, case no. 73053/01 of 23 November 2006 – *Jussila v. Finland*, no. 43.

45 N. 277 above.

46 N. 281 above.

47 WILS (n. 241 above) 14–18.

48 N. 282 above.

49 HEINEMANN, Kriminalrechtliche Individualsanktionen im Kartellrecht?, in KUNZ/HERREN/COTTIER/MATTEOTTI (eds.), Wirtschaftsrecht in Theorie und Praxis, Festschrift von Büren (2009) 595, 617.

C. Full Jurisdiction of Courts

As we have seen, there must be the possibility to lodge a complaint against the decision of the competition authority. The competent court must have full jurisdiction and it has to make use of it in fact. It is often criticized that this is not the case. There are different lines of argument. To mention only three of them: First, it is said that courts restrict themselves to examine the objections put forward by the parties, but that they do not analyse all possible circumstances relevant in the specific case. Second, courts feel bound to the competition authorities' notices and guidelines although these texts do not have full legal authority. The third reproach, which is the most fundamental one, relates to the concept of ‹margin of appreciation› and ‹margin of discretion›. According to the critics, courts leave administrative bodies too large a margin in assessing facts or in determining the legal consequences of anti-competitive behaviour.

1. Restriction to the Arguments of the Parties

The Swiss federal administrative court is not restricted to examining the objections brought forward by the parties. However, in the *Swisscom* case, it has made clear that it will primarily deal with the parties' arguments, and that these arguments are not examined in any possible direction, especially if the appellant is represented by a lawyer with special expertise in the field of competition law.[50] In EU law, the concept is different due to the dominant influence by French procedural law. Here, the courts restrict themselves (normally) to the pleas in law and the arguments presented by the applicants.[51] This may be justified by the same reflection used by the Swiss court: Usually the party will be represented by an experienced lawyer so that all relevant arguments will be brought up. However, it seems not very satisfying that in a case brought by several applicants involved in the same anti-competitive behaviour the outcome may vary depending on the pleas of the parties. It seems preferable to develop a more active role of the courts when examining the legality of administrative decisions.

50 Federal Administrative Court – *Swisscom* (n. 245 above) no. 10.7.4 d) with respect to the establishment of a dominant position.

51 See STEINBEISS-WINKELMANN, Europäisierung des Verwaltungsrechtsschutzes, NJW 2010, 1233 (1237); SCHWARZE, Europäische Rahmenbedingungen für die Verwaltungsgerichtsbarkeit, NVwZ 2000, 241 (249). For qualifications see Advocate General JACOBS, Opinion delivered on 30 March 2000, Case C-210/98 P – *Salzgitter/ Commission* [2000] ECR I-5843, no. 125 et seq., who affirms the possibility of the European courts to raise pleas of their own motion if a certain breach is sufficiently important.

2. The Legal Status of Guidelines

Administrative communications, guidelines or notices are not legally binding in a classical sense, but they have nevertheless certain legal effects.[52] They constitute soft law. Whereas in Switzerland and in Germany ‹hard law› at least mentions the possibility of the competition authorities to adopt and to publish communications,[53] the European Commission uses soft law in order to specify hard law without a specific authorization.[54] Whereas in the beginning the European courts were rather reluctant to cite soft law, they refer frequently to these texts nowadays.[55] This development aggravates the need for an improved anchoring of guidelines in the institutional framework. In parallel to Swiss or German law, the competence of the European Commission to adopt such communications should be mentioned explicitly in the relevant regulations. Moreover, courts should not apply these texts as legally binding documents, but bear always in mind that they simply incorporate the interpretation of existing law by an administrative authority.[56]

3. The Intensity of Court Control

As regards the intensity of judicial control, standards differ. German law does not concede any margin of appreciation to administrative authorities regarding the conditions for fines (including forecasts on complex economic effects) and only a very restricted margin of discretion.[57] In a comparative perspective, this seems to be rather strict. The Swiss Federal Administrative Court assumes a restriction of its

52 For this distinction see STEFAN, European Competition Soft Law in European Courts: A Matter of Hard Principles?, 14 European Law Journal 753, 756 (2008). Under the principles of equal treatment and the protection of legitimate expectations, the Commission binds itself by the adoption of guidelines, see THOMAS, Die Bindungswirkung von Mitteilungen, Bekanntmachungen und Leitlinien der EG-Kommission, EuR 2009, 423 (426–427).

53 For Swiss law see Art. 6 Cartel Act with respect to restrictive agreements. For German law, see the general rule in Art. 53 (1) of the Act Against Restraints of Competition and in Art. 81 (7) with respect to fines.

54 Guidelines and similar texts cannot be qualified as recommendations or opinions in the sense of Art. 288 TFEU, see PAMPEL, Rechtsnatur und Rechtswirkungen von Mitteilungen der Kommission im europäischen Wettbewerbsrecht, EuZW 2005, 11 (12).

55 STEFAN (n. 290 above) 757 et seq., who points to the 2001 White Paper on Governance of the European Commission which underlines the importance of soft law instruments for better regulation.

56 Often, guidelines contain a clarification underlining the fact that the text is without prejudice to any interpretation of the law by the European courts, see e.g. EUROPEAN COMMISSION, Commission Notice on agreements of minor importance, OJ 2001, C 368/13, no. 6. For the practice of the European courts see WILS (n. 241 above) 25–26.

57 BORNKAMM, Richterliche Kontrolle von Entscheidungen im deutschen und europäischen Kartellverwaltungsverfahren, ZWeR 2010, 34 (36).

cognition if the nature of the issue requires such a self-restraint.[58] When it comes to technical or economic details where an administrative authority has special expertise the court will only deviate if there is a substantial reason to do so.[59]

The European Courts go in the same direction. Starting point is Art. 31 Regulation 1/2003, according to which the Court of Justice has ‹unlimited jurisdiction to review decisions whereby the Commission has fixed a fine or periodic penalty payment. It may cancel, reduce or increase the fine or periodic penalty payment imposed.›[60] European courts have made frequent use of this possibility. As regards the intensity of control, the Court has stated that ‹in so far as the Commission's decision is the result of complex technical appraisals, those appraisals are in principle subject to only limited review by the Court, which means that the Community Courts cannot substitute their own assessment of matters of fact for the Commission's›.[61] However, the judicial self-restraint is restricted itself. The General Court states that, even if the Commission has a margin of appreciation in economic or technical matters, the courts will control the interpretation of economic or technical data made by the Commission.[62]

Art. 6 ECHR does not opt for a certain national system. Traditionally, French law grants more margin to administrative authorities than for example German law.[63] The European Convention on Human Rights has to be seen as a compro-

58 Federal Administrative Court – *Swisscom* (n. 245 above) no. 5.6.4.2: «Indessen darf nach herrschender Meinung auch das Bundesverwaltungsgericht, obschon es nach der gesetzlichen Ordnung ‹mit freier Prüfung› zu entscheiden hat, seine Kognition einschränken, soweit die Natur der Streitsache dies sachlich gebietet.»

59 *Ibid.*: «Geht es um die Beurteilung technischer oder wirtschaftlicher Spezialfragen, in denen die Vorinstanz über ein besonderes Fachwissen verfügt, ist nur bei erheblichen Gründen von der Auffassung der Vorinstanz abzuweichen.»

60 For the background see Art. 261 TFEU.

61 GENERAL COURT, 17.9.2007, case T-201/04 – *Microsoft* [2007] ECR II-3601, no. 88. See also no. 87: The «review of complex economic appraisals made by the Commission is necessarily limited to checking whether the relevant rules on procedure and on stating reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment or a misuse of powers».

62 *Ibid.*, no. 89. See BAILEY, Scope of Judicial Review under Article 81 EC, 41CMLRev 1327 (2004); BORNKAMM (n. 295 above, 43) who notes that there does not seem to be a huge difference between court control in the EU and systems with complete review: «Dieser Beurteilungsspielraum wird im nächsten Schritt aber wieder so stark eingeschränkt […], dass sich das Ergebnis kaum vom Ausgangspunkt einer vollständigen Überprüfung zu unterscheiden scheint.» In the same sense WILS (n. 241 above) 28. See also VESTERDORF (in BAUDENBACHER, n. 246 above, 387–388) who points to the difficulties of the distinction between margin of appreciation and margin of discretion.

63 See the fundamental inquiry of CLASSEN, Die Europäisierung der Verwaltungsgerichtsbarkeit (1996).

mise between the national legal orders of the Member States.[64] Therefore, it would not be appropriate to interpret Art. 6 ECHR in the light of a national legal order providing for the strictest requirements for the power of appreciation or discretion. As regards the situation in Switzerland, the first case where a court deals with a direct fine imposed by the Competition Commission, i.e. the *Swisscom* case, gives the impression that court review is not exercised too narrowly. To the contrary, the judgment does not only perform a detailed assessment of the administrative decision in question (which is by the way annulled in its major parts), but it also reflects at large on the question if the standards of review meet the requirements of Art. 6 ECHR. We think that the court makes a use of its jurisdiction satisfying these requirements. In our view, the fundamental problem in this context is rather the question if it is appropriate to confer the control over competition authorities to courts which are exclusively composed of legally trained judges.[65] This is a general problem concerning most (but not all[66]) jurisdictions. We think that the growing importance of economics for the application of competition law calls for economic experts not only in the competition authorities but also in (specialized) competition courts.[67]

As the EU is not yet member of the European Convention on Human Rights,[68] Art. 6 ECHR does not apply (directly) to the enforcement of European competition law by the European Commission. But there is an indirect effect (Art. 6 (3) TEU), and there is the Charter of Fundamental Rights of the European Union providing for the right to an independent and impartial tribunal in Art. 47.[69] Therefore, comparable standards apply to the institutional structure of public competi-

64 Cf. JACOBS&WHITE, The European Convention on Human Rights (4th ed. 2006) 2.

65 Even if in the Swiss example economists are represented on the (important) level of court clerks.

66 See e.g. France, where the economist *Frédéric Jenny* sits in the Cour de Cassation.

67 Cf. the proposal of GERBER, Courts as Economic Experts in European Merger Law, in: Hawk (Ed.), Annual Proceedings of the Fordham Corporate Law Institute – International Antitrust Law & Policy (2004) 475–494, who calls for a specialized competition court and for economic consultants assigned to the judges. See also the recent proposal of the Swiss government for a reform of the Swiss Cartel Act (www.seco.admin.ch/themen/02860/04210/index.html?lang=de). Draft article 25c stipulates that the (proposed) Federal Competition Tribunal includes judges with economic expertise.

68 But see Art. 6 (2) TEU.

69 Generally see ECtHR, case no. 45036/98 of 30 June 2005 – Bosphorus v. Ireland, no. 165: «In such circumstances, the Court finds that the protection of fundamental rights by Community law can be considered to be […] ‹equivalent› […] to that of the Convention system.» See the critique of this judgment by BASEDOW/BULST, Der Eigentumsschutz nach der EMRK als Teil der europäischen Wirtschaftsverfassung, in: BAUER/CZYBULKA/KAHL/VOSSKUHLE, Wirtschaft im offenen Verfassungsstaat, Festschrift Reiner Schmidt (2006) 3, 11 et seq.

tion law enforcement. Initially, the European courts respected a rather high degree of judicial self-restraint concerning complex economic appraisals. However, the intensity of control has increased.[70] For the right of access to an independent and impartial tribunal, the intensity of control of the European Courts in recent years seems to be sufficient. There is an abundant case law modifying or quashing fining decisions which underlines the effectivity of judicial control.

How far interference of the courts with economic reasoning of the competition authority extends,may be illustrated by the Spanish *Glaxo* case. According to the courts,[71] the Commission[72] did not sufficiently examine the question if dual pricing in the field of medicinal products improves innovation und thus may fall under Art. 101 (3) TFEU. However, in its decision, the Commission did analyse the determinants of R&D expenditure. It came to the conclusion that there is no evidence that parallel trade has led to cuts or has prevented the growth of the R&D budget.[73] The Courts criticized that the Commission did not analyze sufficiently the economic studies submitted, and that the Commission's conclusions were ‹lapidary›.[74] However, an obligation to respond to all details of the studies submitted could overstep the mark and open the way to defence strategies trying to stall proceedings by the quantity of evidence submitted. For our context, it is sufficient to say that the control practiced by the European courts is adequately dense so that access to courts is granted in a way compatible with fundamental rights requirements.

D. Outlook

There are considerable differences in the institutional settings for the public enforcement of competition law worldwide. Whereas in some countries competition authorities only have investigatory and prosecutorial but no decisional competences (like for example the Antitrust Division of the US Department of Justice), other countries rely on administrative authorities with adjudicative functions. As well, there are mixed systems. In Germany, e.g., the Federal Cartel Office can impose fines. If however the presumed offender objects, a state attorney has to bring charges before the higher regional court.

---

70 Cf. BORNKAMM (n. 295 above) 51.

71 GENERAL COURT, 27.9.2006, Case T-168/01 – *GlaxoSmithKline Services/Commission* [2006] ECR II-2969; ECJ, 6.10.2009, Joined Cases C-501/06 P, C-513/06 P, C-515/06 P, C-519/06 P – *GlaxoSmithKline et al./Commission et al.* [2009] ECR I-0000.

72 EUROPEAN COMMISSION, 8 May 2001 – *Glaxo Wellcome*, OJ 2001 L302/1.

73 *Ibid.*, no 155–169.

74 See for example no 275–279 in Case T-168/01 *GlaxoSmithKline Services/Commission* [2006] ECR II-2969.

In our view, both systems are compatible with the right of access to courts if certain conditions are met. Therefore, it is a question of usefulness which is decisive for the institutional arrangement, and this question may be answered differently in each country. Accordingly, in the EU, it is perfectly legitimate to rely on an administrative authority. However, it is not convincing to attribute the decisional power to a college of 27 Commissioners of whom only the Competition Commissioner has substantial knowledge of the case in question. A fundamental reform is long overdue. From an academic view, the creation of an independent European Competition Office seems preferable.[75] Thus, the competent authority would have higher expertise, it would be less dependent from political influence, and it would be less open to lobbying. However, since for such a reform an amendment of the treaty would be necessary, it is far more realistic to expect some small changes to be made which however will not cure the fundamental flaw inherent in a system of collective competence.

IV. Legal Certainty

A criticism often brought forward is that fines imposed for the infringement of competition law lack legal certainty and thus violate Art. 7 ECHR. This criticism includes both the conditions for punishment and the sanctions triggered by the infringement. As regards Switzerland, the Swiss Federal Administrative Court was confronted with this problem in the *Swisscom* and the *Publigroupe* case. In the former case, the principle of legal certainty induced the court to give a narrow interpretation of the prohibition against abuse of a dominant position. In the latter case, the court confirmed the legality of fines under the principle of legal certainty.

A. The Definition of the Offence

The principle of legality requires that an offence is clearly defined in the law. The addressee must have the possibility – if necessary with the assistance of the courts' interpretation and the assistance of legal advisers[76] – to foresee the possible consequences of a certain behaviour. In the *Swisscom* case, the Swiss Fed-

75 See the intense discussion in the mid-nineties, for example EHLERMANN, Reflections on a European Cartel Office, 32 CML Rev. (1995) 471; NORDMANN, The Case for a European Cartel Office, 3 EPL 223 (1997).

76 See ECtHR, 15 November 1996 – *Cantoni v. France*, no. 35: «A law may still satisfy the requirement of foreseeability even if the person concerned has to take appropriate legal advice to assess, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.»

eral Administrative Court had to answer the question, if the prohibition of abusive conduct by dominant firms complies with the principle of legal certainty. The Court drew a distinction between the general interdiction of abusive behaviour in Art. 7 of the Swiss Cartel Act and the examples listed in the second paragraph of this article. According to the court, the general interdiction is not able to ensure sufficient predictability. However, the ‹indivisible unit›[77] between the general prohibition of abusive behaviour and the catalogue of specific abuses in Art. 7(2) Swiss Cartel Act removes such doubts.[78] As a result, only conduct which may be attributed to one of the examples in the list may be fined.

This reasoning is not convincing.[79] It is not correct to deny the predictability of the prohibition of abusive behaviour. It is recognized by the European Court of Human Rights that a legitimate technique of regulation is the use of general categories as opposed to exhaustive lists.[80] The necessary consequence is the existence of grey areas. It is decisive for legal certainty, that the relevant rule is sufficiently clear in the large majority of cases.[81] Art. 7 Swiss Cartel Act is modelled on the corresponding European rule (today Art. 102 TFEU). There is abundant case law and administrative practice in European and Swiss law.[82] This has led to a degree of concretisation guaranteeing foreseeability and certainty. Besides, there are countries, like for example the Netherlands, which have renounced on a list of examples and just provide for a general prohibition against the abuse of dominance.[83] Should such a regulatory technique be excluded from the outset?

Moreover, it has to be asked if the reasoning of the Court would apply to the field of restrictive agreements, too. This is of course no problem for Swiss law, since only specific hardcore restrictions are subject to fines.[84] But it would be a considerable change for European competition law if only agreements could be fined which have as their object or effect one of the examples listed in Art. 101(1)lit.a-e TFEU. It would even completely exclude fines for restrictive agree-

77 Untrennbare Einheit.

78 Federal Administrative Court – *Swisscom* (n. 245 above) no. 4.2 – 4.5 and 11.1.3.

79 For a critique see HEINEMANN (n. 279 above) at III 1.

80 ECtHR – *Cantoni v. France* (n. 314 above) no. 31: «The need to avoid excessive rigidity and to keep pace with changing circumstances means that many laws are inevitably couched in terms which, to a greater or lesser extent, are vague. The interpretation and application of such enactments depend on practice.»

81 *Ibid.*, no. 32.

82 The Court recognizes that Swiss *and* foreign court practice may be referred to when establishing adequate legal certainty, see Federal Administrative Court – *Publigroupe* (n. 279 above) no. 8.1.5.1 (with respect to Art. 7 (2) lit. b Swiss Cartel Act).

83 See Art. 24 of the Dutch Competition Act (Mededingingswet).

84 Art. 49a (1) Swiss Cartel Act only refers to Art. 5 (3) and (4) of the same Act covering selected – horizontal or vertical – hardcore restrictions like for example price fixing and the allocation of markets or customers.

ments under German law since the German Act Against Restraints of Competition (GWB) renounces on a ‹laundry list› for restrictive agreements.[85]

B. Legal Certainty with Respect to the Legal Consequences

In the *Swisscom* case, the Administrative Court rejects the existence of an ‹imposition› of unfair prices since the clients of the incumbent have the possibility to ask the regulatory authority for a reduction of mobile termination rates. This is not the place to comment on the interpretation of substantive law.[86] The consequence for the Court is clear: As the other examples listed in the Swiss rule on abusive behaviour are not relevant, and since the court rejects the possibility to base fines on the general interdiction of abusive behaviour, it annuls the fine imposed by the competition authority so that nothing has to be said on the question if the fines provided for in Swiss competition law meet the requirement of legal certainty.

According to some commentators, fines do not comply with the requirement of legal certainty as their scope is not defined sufficiently.[87] In this view, Art. 23 (3) Regulation 1/2003, which simply mentions the gravity and the duration of the infringement, is too vague. Similar objections are raised against the flexibility of the legal maximum which is fixed at 10% of the total turnover in the preceding business year, and against the discretion of the competition authorities. The arguments are not basically different in Swiss law,[88] although here a legally binding text on the calculation of fines (and on leniency) exists.[89]

The points raised in this context would deserve a discussion much more intense than is possible here.[90] We think that the reference to turnover criteria is indeed an appropriate benchmark for determining the gravity of anticompetitive behaviour, much better than the cartel rent.[91] Discretion of the competition authorities does not violate the rule of law as long as the parties know with sufficient clarity in which manner it is exercised, provided of course that no arbitrary use is made

85 See Section 1 GWB.

86 For a critique of the Court's interpretation of Art. 7 (2) lit. c Swiss Cartel Act see HEINEMANN (n. 279 above) at III 3.2.

87 See e.g. SCHWARZE/BECHTOLD/BOSCH (n. 260 above) p. 16 et seq. With respect to German law see BRETTEL/THOMAS (n. 263 above) 25–64.

88 See the arguments of *Swisscom* in Federal Administrative Court – *Swisscom* (n. 245 above) no. 4.1.2.

89 Cartel Act Sanctions Ordinance (CASO), see n. 255 above. The Federal Administrative Court points to this difference in the *Publigroupe* case, see Federal Administrative Court – *Publigroupe* (n. 279 above) no. 8.1.7.2.

90 For a detailed analysis see for example THEURER (n. 252 above) 283 et seq.

91 See part II above.

hereof. Therefore, the present situation is compatible with the principle of legal certainty. Swiss and European courts rightly have held in this sense.[92]

However, it has to be asked if it is satisfying to lay down the relevant criteria only in guidelines as it is momentarily the case in the EU and in Germany. It seems preferable to have a legally binding text on the calculation of fines and on leniency.[93] European law might be inspired by Swiss law which has an Ordinance on Sanctions providing for criteria for the calculation of sanctions and containing the leniency rules.[94] It is not consequent to have an implementing regulation on the proceedings before the European Commission,[95] but not to have an implementing regulation on the sanctions which may be imposed at the end of these proceedings.

V. Concluding Remarks

Growing amounts of fines have intensified the debate on competition procedure. Competition law sanctions are subject to the rule of law. According to the position defended here, fines may be imposed by administrative authorities if there is sufficient court control. As this question is highly debated, it would be important to soon have a judgment from the Strasbourg Court on the institutional requirements for the imposition of competition law fines. Another controversial point relates to the principle of legal certainty. In our view, legal certainty is respected even if the law makes do with a turnover-based cap and refers to the gravity and the duration of the offence in a general way. However, it would be desirable to specify the criteria for the determination of fines (along with the leniency rules) in a legally binding text as it is already the case in Swiss law. This is

92 For Switzerland see Federal Administrative Court – *Publigroupe* (n. 279 above) no. 8.1.7. For the EU see ECJ, 22.5.2008, case C-266/06 P – *Evonik Degussa* [2008] I-81, no. 36 et seq., which – citing Art. 7 ECHR and the case law of the ECtHR – affirms the conformity of the fines' legal basis with the principles of certainty and predictability (under old law, i.e. Art. 15 (2) Regulation 17). Confirmed by ECJ, 17.6.2010, case C-413/08 P – *Lafarge* [2010] ECR I-0000, no. 94–95.

93 The European Parliament has called for a legally binding instrument in the field of leniency, see EUROPEAN PARLIAMENT, Resolution on the XXVIth report by the Commission on competition policy, OJ 1997 C 358/55, no. 8. See also the proposal of SCHWARZE/BECHTOLD/BOSCH (n. 260 above) 83.

94 See n. 327 above. However, it has to be added that for the critics, even this text does not meet the requirements of legal certainty, see the arguments of *Swisscom* in Federal Administrative Court – *Swisscom* (n. 245 above), no. 4.1.2.

95 Commission Regulation (EC) No 773/2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty of 7 April 2004, OJ L 123/18.

particularly important for the EU since its legal system does not include general rules of criminal law which could be made recourse to. There are certainly tensions between efficiency and due process in the context of fines. But it is possible to achieve a balance.